SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-525

PETER KENNETH CUEVAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA,

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BRIEF OF RESPONDENT

OPINION BELOW

On May 16, 1973, the Supreme Court of Florida filed its opinion in Cuevas v. State, Case Number 42,887. Petitioner Cuevas filed a Petition for Rehearing which was denied on July 25, 1973; and, thus, the opinion previously filed on May 16, 1973, became final. The opinion sought to be reviewed herein is reported at 279 So.2d 817, and is printed in Petitioner's Appendix B.

JURISDICTION

Petitioner is attempting to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257, which, as applicable herein, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."
> (Emphasis supplied.)

QUESTIONS PRESENTED

I.

WHETHER CHAPTER 404, FLORIDA STATUTES, KNOWN AS THE "FLORIDA DRUG ABUSE LAW" WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CANNABIS ON JANUARY 11, 1972?

II.

WHETHER THE JUDGMENT SOUGHT TO BE REVIEWED WAS AN UNFORESEEABLE JUDICIAL ENLARGEMENT OF A CRIMINAL STATUTE, APPLIED RETROACTIVELY, AND THUS IN VIOLATION OF CONSTITUTIONAL DUE PROCESS GUARANTEES AS ENUNCIATED IN BOUIE v. COLUMBIA, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)?

STATE STATUTES INVOLVED

This case involves the provisions of Chapter 404, Florida Statutes, known as the "Florida Drug Abuse Law" as applicable to cannabis on January 11, 1972. Chapter 404, Florida Statutes, as it was in effect on January 11, 1972, is set out in its entirety herein as Respondent's Appendix A. Chapter 404, Florida Statutes, had been amended by Chapter 71-107, Laws of Florida, 1971, effective July 1, 1971. Chapter 71-107 is set forth in full in Petitioner's Appendix C, pp. 8-10. Chapter 404, Florida Statutes, was next amended by Chapter 72-97, Laws of Florida, 1972, effective March 28, 1972. Chapter 72-97 is printed in full in Petitioner's Appendix C, pp. 11-12.

ARGUMENT

I.

WHETHER CHAPTER 404, FLORIDA STATUTES, KNOWN AS THE "FLORIDA DRUG ABUSE LAW" WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CANNABIS ON JANUARY 11, 1972?

Prior to July 1, 1971, the possession or delivery of cannabis was controlled by Chapter 398, Florida Statutes, known as the "Uniform Narcotic Drug Law". Indeed, Chapter 398, Florida Statutes, as applicable to cannabis (marijuana) had withstood a broad constitutional attack in 1969 when the Supreme Court of Florida rendered its opinion in Borras v. State, 229 So.2d 244, app.dism., 400 U.S. 808, 27 L.Ed.2d 37, 91 S.Ct. 70 (1970). In Borras, marijuana was characterized as ". . . a harmful, mind-altering drug." 229 So.2d at 246.

On July 1, 1971, Chapter 71-107, Laws of Florida, became effective. The purpose of Chapter 71-107 was to remove cannabis from the controls of Chapter 398, Florida Statutes, and to place cannabis under the control of Chapter 404, Florida Statutes. This purpose was made clear by the title

to Chapter 71-107, which provided:

> "AN ACT relating to drug abuse; amending chapter 404, Florida Statutes, by including cannabis among substances controlled by the Florida drug abuse law; providing that the crime of possession or delivery without consideration of cannabis, on the first offense, shall constitute a misdemeanor; providing for arrest upon probable cause for such crime; amending subsection (5) of section 398.10, Florida Statutes, to delete reference to cannabis therein; repealing subsection (12) of section 398.02, Florida Statutes; amending Section 398.02(13)(a), Florida Statutes to delete reference to cannabis therein; providing an effective date."

Section 1 of Chapter 71-107 amended Section 404.01, Florida Statutes, by creating a new subsection (12) to establish a definition of "cannabis". This definition was substantially identical to the definition of cannabis which had previously been found in

Section 398.02(12), Florida Statutes, and provided:

> "The word 'cannabis' means all parts of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination."

The penalty provision section of Chapter 404, Florida Statutes, was amended by Section 2A of Chapter 71-107 as follows:

> "Section 2A. Subsection (1) of section 404.15, Florida Statutes, is amended to read:
>
> "404.15 Penalties.--Any person who violates any of the provisions

of this chapter shall be punished as follows:

"(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083, and 775.084; ~~by imprison ment in the state penitentiary for not more than 2 years or by a fine of not more than $1,000, or both,~~ provided that if the first offense is the possession or delivery without consideration of not more than five (5) grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in sections 775.082 and 775.083, provided, further, that for the purposes of this subsection, the word cannabis shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin."

Thus, it was with no small degree of specificity that the Legislature penalized first offense possession or delivery without consideration of not more than five (5) grams of cannabis.

Finally, as applicable to Chapter 404, Florida Statutes, Section 3 of Chapter 71-107 amended Chapter 404, Florida Statutes, to create a new subsection:

> "404.021 Arrest without warrant.-- Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant, any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis."

The prohibited acts provisions of Chapter 404, Florida Statutes, in effect on January 11, 1972, stated:

> "(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in §404.04, unless:
>
> * * *
>
> "(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any person unless such person

> obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for a bona fide medical use, and except as provided in §404.04." (Emphasis supplied.)

The Supreme Court of Florida reduced petitioner's vagueness challenge to Chapter 404, Florida Statutes, as applicable to cannabis, down to two questions:

> "1. Did the Legislature intend to prohibit the delivery and possession of cannabis by Sections 404.02(1) and 404.02(4), Florida Statutes, F.S.A., supra?
>
> "2. If the answer to the first question is in the affirmative, then is the phrase '* * * or other drug controlled by this chapter * * *' of sufficient legal clarity to avoid a constitutional onslaught for vagueness?"
> Cuevas, supra, page 819.

These questions were answered by the court below in the affirmative. In so deciding, it is clear that the court relied on the plain and precise language of Chapter 71-107, which amended Chapter 404, Florida Statutes, to include cannabis, and which repealed those portions of Chapter 398, Florida Statutes, that had previously controlled cannabis. Additionally, the court noted that their construction of Chapter 404, Florida Statutes, as amended by Chapter 71-107, was a proper one, and pointed to Chapter 72-97, Laws of Florida, 1972, effective March 28, 1972 (Chapter 72-97 is printed in full in Petitioner's Appendix C, pp. 11-12), and to their prior opinion in State v. Hayles, 240 So.2d 1 (Fla. 1970). The Court said:

> ". . . The best evidence that the Legislature did not intend such a death knell for cannabis proscriptions is the following 'whereas' language appearing in Chapter 72-97, Laws of Florida:
>
> "'Whereas, there has been called to the attention of the legislature that some confusion has arisen as to the scope of chapter 404, Florida Statutes; and
>
> "'Whereas, said chapter has been interpreted by one lower court of record to exclude the drug cannabis but by other courts as to include same; and

"'Whereas, this legislature, while having no doubt as to its original intent to include said drug, yet wishing to clarify the matter so as to preclude any possible misunderstanding; and

"'Whereas, this legislation is intended solely by way of clarification and explanation, Now, Therefore,'

"Chapter 72-97 goes on to include the definition of 'cannabis' as defined by Section 404.01(12) within the definition of the words 'hallucinogenic drug' as defined by Section 404.01(3). Of course, the clarification of Chapter 72-97 cannot be applied retroactively, but it is further, though not indispensable, persuasive evidence in support of the proper construction of the earlier statute.

"An affirmative answer to the first question leads unerringly to State v. Hayles, in which this Court found the phrase 'or other drug controlled by this chapter':

'. . . . [O]f such determinative meaning and reasonably specific and sufficient precision as to clearly advise a citizen of the conduct which is proscribed; thus

the statute is not unconstitutionally vague in this case.'

"This Court continued:

'Fla.Stat. § 404.01, F.S.A., of the chapter in Definitions lists specific types of substances to which the entire Ch. 404 is to apply. These include barbiturates, central nervous system stimulants, and hallucinogenic drugs. Fla.Stat. § 404.02, F.S.A., makes unlawful the delivery of barbiturates, central nervous system stimulants, or of "any * * * other drug controlled by this chapter," and also makes unlawful the possession of barbiturates, central nervous system stimulants, "or other drug controlled by this law * * *."

'Reading Fla.Stat. §§ 404.01 and 404.02, F.S.A., in conjunction, the only reasonable conclusion is that the Legislature intended to make unlawful under § 404.02, the possession or delivery of substances named in § 404.01.'

"[3] As applicable to the case at bar, when Chapter 71-107, Laws of Florida, became effective, 'cannabis' was defined by Section 404.01(12) and the delivery and possession thereof were clearly proscribed by Sections 404.02(1) and 404.02(4), Florida Statutes...." Cuevas, supra, pages 819-820.

In determining whether a penal statute statute is too vague and indefinite to meet the requirements of due process, this Court stated the following guidelines in Connally v. General Construction Co., 269 U.S. 385, 70 L.Ed.322, 46 S.Ct. 126 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . "
> Connally, supra, at 391.

In United States v. Harriss, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954), the test of vagueness was worded thusly:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails

> to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."
> Harriss, supra, at 617.

Given the precise language of Chapter 71-107, and the previous construction of Chapter 404, Florida Statutes, by the Supreme Court of Florida in State v. Hayles, supra (see Wainwright v. Stone and Huffman, 42 U.S.L.W. 3267 (U.S. Nov. 5, 1973), which reaffirms the principle that federal courts must judge a state statute on a vagueness challenge in the light of prior state constructions of the statute), it is beyond question that a person of ordinary intelligence reading Chapter 404, Florida Statutes, on January 11, 1972, and its previous case construction would know that cannabis as defined by Section 404.01(12), Florida Statutes, was a drug whose delivery and possession were prohibited criminal acts as proscribed by Sections 404.02(1) and 404.02(4), Florida Statutes.

II.

WHETHER THE JUDGMENT SOUGHT TO BE REVIEWED WAS AN UNFORESEEABLE JUDICIAL ENLARGEMENT OF A CRIMINAL STATUTE, APPLIED RETROACTIVELY, AND THUS IN VIOLATION OF CONSTITUTIONAL DUE PROCESS GUARANTEES AS ENUNCIATED IN BOUIE v. COLUMBIA, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)?

In Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), the petitioners had taken seats in the restaurant department of an Eckerd's Drug Store, and awaited service. Instead of service, the petitioners were asked to leave by the store manager and the police who had been called. When the petitioners refused to leave, they were arrested and charged, inter alia, with criminal trespass in violation of Section 16-386 of the South Carolina Code of 1952 (1960 Cum. Supp.), which provided:

> ". . .'Entry on lands of another after notice prohibiting same.--Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after

> notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid for the purpose of trespassing'."
> Bouie, supra, at 350.

Petitioners were convicted under the trespass statute, and their convictions were affirmed by the South Carolina Supreme Court based on its construction of the statute ". . . to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." Bouie, supra, at page 350.

On certiorari, this Court reversed, agreeing with the petitioners that the construction given the statute by the

South Carolina Supreme Court in order to affirm their convictions operated to punish them for conduct that was not criminal at the time they committed it; and thus had violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct sought to be prohibited. In so deciding the cause, this Court stated:

> ". . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one ' that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater, than it was, when committed.' Calder v. Bull, 3 Dall 386, 390, 1 L ed 648, 650. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v. Cahoon, 283 US 553, 565, 75 L ed 1264, 1273, 51 S Ct 582. The fundamental

> principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61." (Emphasis by Court) Bouie, supra, at 353-354.

The evil done to the petitioners in Bouie by the unforeseeable judicial enlargement of a criminal statute applied retroactively, and hence the imposition of a criminal penalty for conduct,which, when committed, was not fairly stated to be criminal, did not occur to the petitioner herein. It was not necessary for the Supreme Court of Florida to read cannabis into the criminal proscriptions of Chapter 404, Florida Statutes, as it existed on January 11, 1972. The opinion of the court below in petitioner's cause did nothing more than affirm the obvious -- that Chapter 71-107, as it amended Chapter 404, Florida Statutes, to include cannabis within its criminal sanctions, was sufficiently definite to warn all those who might desire to deliver and possess cannabis that their conduct would

be proscribed. The Supreme Court of Florida did not affirm the petitioner's conviction by an unforeseeable judicial enlargement of Chapter 404, Florida Statutes, applied retroactively. The court merely affirmed his conviction by finding that the Florida Legislature had done exactly what they had intended to do by enacting Chapter 71-107, and that they had done it in terms that would give a person of ordinary intelligence fair notice that his delivery and possession of cannabis after July 1, 1971, would be forbidden by Chapter 404, Florida Statutes.

The principles of Bouie were not violated; indeed, those principles were not even slightly penetrated in the case sub judice.

CONCLUSION

The judgment of the Supreme Court of Florida in the case sought to be reviewed is in complete accord with the provisions of the Constitution of the United States raised herein as they are written and as they have been interpretated by this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent have been furnished petitioner's counsel, the Honorable Louis Ossinsky, Jr., OSSINSKY AND KROL, 411 Main Street, Post Office Drawer "E", Daytona Beach, Florida 32018, by U.S. Mail, this _____day of December, 1973.

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RESPONDENT'S
APPENDIX A

CHAPTER 404

FLORIDA DRUG ABUSE LAW

404.001 Short title.
404.01 Definitions.
404.015 Legislative intent.
404.02 Prohibited acts.
404.021 Arrest without warrant.
404.04 Exemptions.
404.041 Devices for injecting, smoking or using certain drugs; prohibition.
404.05 Records.
404.06 Inspection.
404.07 Contraband.
404.08 Seizure and forfeiture of vessel, vehicle, or aircraft illegally used.
404.09 Procedure to have vessel, vehicle, or aircraft forfeited or sold.
404.10 Rights of mortgagee or vendor.
404.11 Injunctions.
404.12 Rules and regulations.
404.13 Exceptions and exemptions not required to be negatived.
404.14 Notice of conviction to be sent to licensing board or officer.
404.15 Penalties.

404.001 Short title.—This chapter shall be cited and known as the "Florida Drug Abuse Law."

History.—§1, ch. 67-132.

404.01 Definitions.—For the purposes of this chapter:

(1) The words "barbiturate" or "barbiturates" mean each of the salts and derivatives of barbituric acid, also known as "malonylurea," and derivatives, compounds, mixtures or preparations thereof. "Barbiturate" or "barbiturates" include hypnotic and somnifacient drugs, whether or not derivatives of barbituric acid, except that this law shall not apply to narcotics, as now or hereafter defined by the Legislature of Florida, or bromides.

(2) The words "central nervous system stimulant" or "central nervous system stimulants" mean amphetamine, desoxyephedrine (methamphetamine), mephentermine, pipradol, phenmetrazine, methylphenidylacetate or any of the salts of any of the foregoing.

(3) The words "hallucinogenic drug" mean "lysergic acid" and "lysergic acid amide," "LSD" (lysergic acid diethylamide), "DMT" (dimethyltryptamine), "peyote," "mescaline," "psilocyn," "psilocybin," including their salts and derivatives, or any compounds, mixtures and every substance neither chemically nor physically distinguishable from them, and any and all derivatives of same and any other drug to which the drug abuse laws of the United States apply, and rivea corymbosa (ololiuqui) when used as a hallucinogen.

(4) The word "delivery" means selling, dispensing, giving away, leaving with or supplying in any other manner.

(5) The word "patient" means as the case may be:

(a) The individual medically requiring a barbiturate or a central nervous system stimulant, for whom a barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed or to whom a barbiturate or a central nervous system stimulant or other drug controlled by this law is administered; or

(b) The owner or the agent of the owner of an animal medically requiring a barbiturate or a central nervous system stimulant or other drug controlled by this law for which such a drug is prescribed or to which such a drug is administered.

(6) The word "person" includes individual, corporation, partnership and association.

(7) The word "practitioner" means a person authorized by law to practice medicine, osteopathic medicine, dentistry, veterinary medicine or naturopathy in this state.

(8) The word "pharmacist" means a person authorized by law to practice pharmacy in this state.

(9) The word "prescription" means an order written or signed or transmitted by word of mouth, telephone or telegraph or other means of communication issued in good faith in the course of professional practice only, by a practitioner to a pharmacist for a barbiturate, a central nervous system stimulant or other drug controlled by this law, for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and, if such barbiturate or central nervous system stimulant or other drug controlled by this law is prescribed for an animal, the species of such animal), the name and quantity of such drug prescribed, the directions for the use of such drug. The record so made shall constitute the original prescription to be filled and preserved by the pharmacist.

(10) The word "manufacturer" means a person who manufactures barbiturates and central nervous system stimulants or any other drug controlled by this law and includes persons who prepare such drugs in dosage forms by mixing, compounding, encapsulating, entableting, packaging, repackaging or other process, but does not include a pharmacist who merely packages, prepares or compounds drugs to fill prescriptions received or to be received by him from a practitioner.

(11) The word "wholesaler" means a person engaged in the business of distributing barbiturates and central nervous system stimulants or other drug controlled by this law to persons included in any of the classes named in §404.04(2)(a)-(f).

(12) The word "cannabis" means all parts

of the plant cannabis sativa, L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant, which is incapable of germination.

Nothing in subsections (1), (2) and (3) of this section shall be construed to include items commonly known as patent or proprietary preparations which are sold as over-the-counter items not requiring a prescription.

History.—§1, ch. 57-384; §2, ch. 67-130; §1, ch. 71-107.

404.015 Legislative intent.—It is the intent of the legislature that all drugs controlled by the drug abuse laws of the United States, now or in the future, shall, in addition to the drugs specified by the laws of Florida, be controlled by the terms of this chapter.

History.—§1, ch. 70-44.

404.02 Prohibited acts.—The following shall be unlawful:

*(1) The delivering or causing to be delivered of any barbiturate or central nervous system stimulant or other drug controlled by this chapter, except as provided in §404.04, unless:

(a) Such barbiturate or central nervous system stimulant is delivered by a pharmacist in good faith, upon a prescription, or an authorized refill thereof, as hereinafter provided, and there is affixed to the original container in which such drug is delivered a label bearing:

1. The name and address of the establishment from which such drug was delivered;

2. The date on which the prescription for such drug was filled;

3. The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;

4. The name of the pharmacist and his license number;

5. The name of the practitioner who prescribed such drug;

6. The name of the patient, and if such drug was prescribed for an animal a statement showing the species of the animal; and

7. The directions for the use of the drug as contained in the prescription; or

(b) Such barbiturate or central nervous system stimulant is delivered or administered by a practitioner in good faith and in the course of professional practice only, and the original container in which such drug is delivered bears a label on which appears the date of delivery, the directions for use of such drug, the name of such practitioner, the name of the patient, and if such drug is prescribed for an animal a statement showing the species of the animal.

(c) A person to whom or for whose use any drug controlled under the authority of this chapter has been prescribed, sold or dispensed by a physician, dentist, apothecary and the owner of any animal for which any such drug has been prescribed, sold or dispensed by a veterinarian, possesses it only in the container in which it was delivered to him by the person selling or dispensing same.

(2) The refilling of any prescription for a barbiturate, central nervous system stimulant or other drug controlled by this chapter unless and to the limited extent designated on the prescription by the practitioner, or subsequently authorized by him.

(3) The delivery of a barbiturate or a central nervous system stimulant or hallucinogenic drug upon written prescription unless the pharmacist who filled such prescription files and retains it for a period of two years.

(4) The actual or constructive possession or control of a barbiturate, central nervous system stimulant, or other drug controlled by this chapter by any person unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in §404.04.

(5) The actual or constructive possession or control of an hallucinogenic drug by any person, except as provided in §404.04.

(6) The refusal to make available and to afford full opportunity to check any record, file, stock or inventory, as required by §404.06.

(7) The failure to keep records, as required by §404.05.

(8) The using by any person to his own advantage, or the revealing of any information required under the authority of §404.06, concerning any method or process which, as a trade secret, is entitled to protection, except to law enforcement officers, or an officer or employee of the division of health of the department of health and rehabilitative services, or to a court when relevant in a judicial proceeding under this chapter.

(9) Obtaining or attempting to obtain a barbiturate or a central nervous system stimulant or hallucinogenic drug or procuring or attempting to procure the administration of a barbiturate or a central nervous system stimulant or hallucinogenic drug:

(a) By fraud, deceit, misrepresentation or subterfuge, or

(b) By the forgery or alteration of a prescription, or

(c) By the concealment of a material fact, or

(d) By the use of a false name or the giving of a false address.

(10) Making a false statement in any prescription, order, report, or record referred to in this chapter.

(11) Falsely assuming the title of or falsely representing any person to be a manufacturer, wholesaler, pharmacist, physician, den-

tist, veterinarian or other authorized person for the purpose of obtaining a barbiturate or a central nervous system stimulant or hallucinogenic drug.

(12) Making, issuing or uttering any false or forged prescription.

(13) Affixing any false or forged label to a package or receptacle containing a barbiturate or a central nervous system stimulant.

History.—§2, ch. 57-384; §2, ch. 67-136; §1, ch. 69-4; §1, ch. 69-1741; §§18, 38, ch. 69-106.

*Note.—Although §3, ch. 67-136 purported to amend subsection (1) in its entirety, it actually republished only the introductory paragraph and added new paragraph (c). Paragraphs (a) and (b) are included here on the assumption that no implied repeal was intended. They will be reenacted by a subsequent revisor's bill.

404.021 Arrest without warrant.—Notwithstanding any provision of the laws of this state relating to arrest to the contrary, a law enforcement officer may arrest without warrant any person whom he has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis.

History.—§3, ch. 71-107.

404.04 Exemptions.—The provisions of §404.02 (1) and (4) shall not be applicable to:

(1) The delivery for medical or scientific purposes only of barbiturates or central nervous system stimulants to persons included in any of the classes hereinafter named, or to the agents or employees of such persons, for use in the usual course of their business or practice or in the performance of their official duties, as the case may be, or

(2) The actual or constructive possession or control of barbiturates or central nervous system stimulants or other drugs controlled by this law by such persons or their agents or employees for such employees for such use, to wit:

(a) Pharmacists.

(b) Practitioners.

(c) Persons who procure barbiturates or central nervous system stimulants for disposition in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them; or for the purpose of lawful research, teaching, or testing, and not for resale, including medical schools.

(d) Hospitals which procure barbiturates, central nervous system stimulants or other drugs controlled by this law for lawful administration by practitioners, but only for use by or in the particular hospital.

(e) Officers or employees of federal, state or local governments acting in their official capacity only, or informers acting under their jurisdiction.

(f) Registered manufacturers, wholesalers, carriers, and warehousemen.

History.—§4, ch. 57-384; §5, ch. 67-136.

404.041 Devices for injecting, smoking or using certain drugs; prohibition.—It is unlawful for any person to possess, have under his control, sell, or deliver any device, contrivance, instrument, or paraphernalia with the intent that said device, contrivance, instrument, or paraphernalia be used for unlawfully injecting, smoking, or using any drug controlled by this chapter.

History.—§1, ch. 69-370.

***404.05 Records.**—Persons designated in §404.04, except carriers, warehousemen, and officers acting in their official capacity, shall keep records of delivery and receipt of derivatives of barbituric acid, central nervous system stimulants, and hallucinogens, which may be dispensed only pursuant to a prescription, in the same manner as records of narcotic drugs are kept under the requirements of §398.10.

History.—§5, ch. 57-384; §6, ch. 67-136; §2, ch. 71-313.

*Note.—This section as amended takes effect January 1, 1972.

404.06 Inspection.—Prescriptions, files and records required by or under the authority of this chapter, and stocks of barbiturates and central nervous system stimulants, shall be open for inspection to officers and employees of the division of health of the department of health and rehabilitative services. No person having knowledge by virtue of his office of any such prescriptions, files or records shall divulge such knowledge, except in connection with a prosecution or proceeding in court, or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, files or records relate is a party.

History.—§6, ch. 57-384; §§18, 38, ch. 69-106.

404.07 Contraband.—All barbiturates, central nervous system stimulants, and hallucinogenic drugs, as herein defined, which may be handled, delivered, possessed, or distributed contrary to any provisions of this chapter are declared to be contraband and shall be subject to seizure and confiscation by any law enforcement officer of this state, or any political subdivision thereof, and by any officer or employee of the department of law enforcement.

History.—§7, ch. 57-384; §4, ch. 67-2007; §3, ch. 69-4; §§30, 38, ch. 69-106.

404.08 Seizure and forfeiture of vessel, vehicle, or aircraft illegally used.—

(1) Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place may be seized and forfeited, provided that no vessel, vehicle, or aircraft used by any person as a common carrier, in the transaction of business as such common carrier, shall be forfeited under the provisions of this chapter unless it shall appear that in the case of a railway car or engine, the owner, or in the case of any other such vessel, vehicle, or aircraft the owner or the master of such vessel, or the owner or conductor, driver, pilot, or other person in charge of such vehicle, or aircraft, was at the time of the alleged illegal act a consenting party thereto; provided

further that no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed, or omitted, by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal law of the United States, or of this state or any political subdivision thereof.

(2) Any law enforcement agency is empowered to authorize or designate officers, agents, or other persons to carry out the seizure provisions of this section. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the respective law enforcement agency, pursuant to these provisions.

History.—§3, ch. 57-304.

404.09 Procedure to have vessel, vehicle, or aircraft forfeited or sold.—

(1) The state attorney within whose jurisdiction the vessel, vehicle, or aircraft has been seized because of its use or attempted use in violation of any provision of this chapter shall proceed against the vessel, vehicle, or aircraft by rule to show cause in the circuit court having jurisdiction of the offense, and have it forfeited to the use of or the sale by the law enforcement agency making the seizure on producing due proof that the vehicle was being used in violation of the provisions of this chapter; provided that the provisions of this section shall not apply to innocent parties nor destroy any valid lien or retain title contract on vessels, aircraft or motor vehicles as defined by existing registration law and the notation of a lien upon the face of the certificate of title shall be deemed prima facie valid.

(2) Where it appears by affidavit that the residence of the owner of the vessel, vehicle, or aircraft is out of the state, or is unknown to the state attorney, the court shall appoint an attorney-at-law to represent the absent owner against whom the rule shall be tried contradictorily within ten days after its filing. This affidavit may be made by the state attorney or one of his assistants. The attorney so appointed may waive service and citation of the petition or rule, but shall not waive time nor any legal defense.

(3) Whenever the head of the law enforcement agency effecting the forfeiture deems it necessary or expedient to sell the property forfeited, rather than retain it to the use of the law enforcement agency, he shall cause an advertisement to be inserted in an official newspaper of the county where the seizure was made, and after ten days shall dispose of said property at public auction to the highest bidder for cash and without appraisal.

(4) The proceeds of all funds collected from any such sale shall be paid into the general fund of the county in which the seizure and sale was made.

History.—§9, ch. 57-304; (1) §1, ch. 69-139.

404.10 Rights of mortgagee or vendor.—The rights of any bona fide holder of a duly recorded mortgage, or duly recorded vendor's privilege, on the property seized under this chapter shall not be affected by the seizure.

History.—§10, ch. 57-304.

404.11 Injunctions.—The department of law enforcement shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this chapter. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law.

History.—§11, ch. 57-304; §4, ch. 67-2207; §139, 36, ch. 69-106.

404.12 Rules and regulations.—The department of law enforcement shall, from time to time, adopt such rules and regulations as may be reasonably necessary to implement and carry out the purpose of this chapter.

History.—§12, ch. 57-304; §4, ch. 67-2207; §139, 36, ch. 69-106.

404.13 Exceptions and exemptions not required to be negatived.—In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this chapter, and the burden of proof in any such exception, excuse, proviso, or exemption shall be upon the defendant.

History.—§13, ch. 57-304.

404.14 Notice of conviction to be sent to licensing board or officer.—On the conviction of any person of the violation of any provision of this chapter a copy of the judgment and sentence and of the opinion of the court, if any opinion be filed, shall be sent by the clerk of the court to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person the court may, in its discretion, recommend to the respective licensing board or officer the suspension or revocation of the registration or license of the convicted defendant to practice his profession or to carry on his business.

History.—§14, ch. 57-304.

404.15 Penalties.—Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in §§775.082, 775.083, and 775.084; ex-

cept that if the first offense is the possession or delivery without consideration of not more than five grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in §§775.082 and 775.083. For the purposes of this subsection, the word "cannabis" shall not include the resin extracted from the plant cannabis sativa, L., or any compound, manufacture, salt, derivative, mixture, or preparation of such resin.

(2) For a second or subsequent conviction, he shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

(3) If the offense consisted of the delivery of any drug controlled by this chapter to a person who had not attained the age of twenty-one years at the time of such offense, the offender, upon conviction, shall be punished as follows:

(a) If the offender has no prior conviction for any offense under chapter 398 or chapter 404 at the time of the commission of the offense of delivery under this section, he shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

(b) If the offender has been previously convicted of any offense under chapter 398 or chapter 404 at the time of the commission of the offense of delivery under this section, he shall be guilty of a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084; and the imposition of the sentence shall not be suspended or deferred, nor shall the person so convicted be placed on probation.

(4) The license to practice in Florida of any practitioner, as defined in §404.01(7), or any pharmacist, as defined by §404.01(8), who violates the provisions of this chapter shall, upon conviction, be automatically revoked.

*(5) Any person who violates the possession or constructive possession provisions of this chapter may, in the discretion of the trial judge, be required to participate in a drug rehabilitation program approved or regulated by the department of health and rehabilitative services pursuant to the provisions of chapter 397, provided the director of such program approves the placement of the defendant in such program. Such required participation may be imposed in addition to or in lieu of any penalty or probation otherwise prescribed by law, provided the total time of such penalty, probation, and program participation shall not exceed the maximum length of sentence possible for the offense.

History.—§15, ch. 57-384; §1, ch. 69-37; §2A, ch. 71-107; §352, ch. 71-136, 6 SC, ch. 71-222.

*Note.—Subsection (5) takes effect January 1, 1972.